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April 15, 1996

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: IB Docket No. 95-59 -- Further Notice of Proposed Rulemaking on the Preemption of Local Zoning Regulation of Satellite Earth Stations

Dear Mr. Caton:

Transmitted herewith, on behalf of Philips Electronics North America Corporation and Thomson Consumer Electronics, Inc. is an original and 10 copies (1 copy for each of the Commissioners and 2 of which are annotated "Extra Public Copy" as required by Public Notice on March 22, 1996) of their Comments in the above-referenced docket.

If you have any questions concerning this matter, please let me know.

Sincerely,

Lawrence R. Sidman

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Counsel for Philips
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning	)	DA 91-577
Regulation of Satellite	)	45-DSS-MISC-93
Earth Stations	)	

COMMENTS OF
PHILIPS ELECTRONICS NORTH AMERICA CORPORATION AND
THOMSON CONSUMER ELECTRONICS, INC.

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COMMENTS OF
PHILIPS ELECTRONICS NORTH AMERICA CORPORATION AND
THOMSON CONSUMER ELECTRONICS, INC.

Philips Electronics North America Corporation ("Philips") and Thomson Consumer Electronics, Inc. ("Thomson") submit comments in the above-captioned Further Notice of Proposed Rulemaking ("Further Notice") to revise the rules regarding preemption of local zoning regulation of satellite earth stations.

I. Philips and Thomson

Philips manufactures television sets and other consumer electronic products, semiconductors, diagnostic imaging systems and other professional equipment marketed under many familiar brand names including Philips, Magnavox and Norelco. Philips has long been a pioneer in the telecommunications and entertainment industries and also played a pivotal role in the development of digital high definition television (HDTV) through the Grand Alliance. Philips now intends to enter a new market by manufacturing and distributing DBS receiving systems.

Thomson also manufactures and distributes television sets and other consumer electronics products under the well-known RCA,

General Electric and ProScan brand names. In addition to its key role in the development of HDTV technology through the Grand Alliance, Thomson developed in cooperation with DIRECTV the first direct broadcast satellite (DBS) receiving system in the United States -- the DSS® system. During 1994, the first year of its introduction, Thomson sold more than 590,000 DSS® units and has sold over 1.8 million units in total through March, 1996.

Philips and Thomson believe that the benefits of new digital technologies like DBS should be available to American consumers as soon as possible. DBS offers consumers exciting possibilities of greater choice and superior quality of picture and sound not available from other delivery systems. However, local zoning regulations and private land use restrictions on small, unobtrusive, 18-inch DBS antennas create unnecessary barriers to the spread of this new technology. In the face of uncertainty about local regulation of DBS antennas, consumers will be discouraged from purchasing DBS hardware, placing DBS at a competitive disadvantage vis-a-vis existing cable systems and other competing service providers.

Philips and Thomson applaud the Commission's efforts to clarify and strengthen its rules preempting unreasonable regulation of satellite antennas. However, the rules the Commission adopted on April 4, 1996 do not go far enough to eliminate unnecessary State and local regulatory barriers to the installation and use of DBS antennas, and thus, fail to satisfy

the mandate of Section 207 of the Telecommunications Act of 1996.[1/] The Commission's implementation of Section 207 requires a per se preemption of both governmental and private restrictions on DBS receivers if it is to be faithful to the letter and spirit of the law.

II. The Commission Should Conform the Rule for Governmental Restrictions to the Proposed Per Se Preemption of Private Land Use Restrictions on DBS Antennas

Philips and Thomson strongly support the Commission's proposal to include in its rules a per se preemption of nongovernmental restrictions on small satellite antenna video reception. In some communities, deed covenants, homeowners or condominium association rules, and other private land use restrictions have raised significant obstacles for residential consumers who want to subscribe to DBS. Clearly, Congress recognized that these types of private land use restrictions "impair" the ability of consumers to use DBS antennas for video programming reception and intended for the Commission's rules to preempt their enforcement entirely. The Commission's per se preemption of private land use restrictions is faithful to the actual language of the provision, its legislative history and Congressional intent.

As the Commission notes in the Further Notice, the proposed rule on private land use restrictions closely tracks the actual

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1/ Telecommunications Act of 1996 ("Telecommunications Act" or "1996 Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996).

language of the legislative history of Section 207.[2/] The Commission's reliance on the legislative history as the clearest indication of Congress' intent in enacting this section is entirely proper and sound. The House Report states, in pertinent part:

> The Committee intends this section to **preempt** enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. **Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section**.[3/] (Emphasis added).

The term "preempt" is clear and unambiguous. It leaves no room for rebuttable presumptions or other complicated regulatory formulae with their attendant administrative burdens and potential for uncertainty.

A per se preemption also is required to effectuate the pro-competitive policy the Congress intended to foster through Section 207. The Congress views DBS as a major competitive technology to cable delivery of multichannel video programming. Congress recognized that regulation or restrictions on DBS antennas, whether in the form of local zoning ordinances or private covenants pose a genuine threat to the growth of DBS. If consumers are uncertain whether it is lawful or permissible to

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2/ See Further Notice at ¶ 62.

3/ H. R. Rep. No. 204, 104th Cong., 1st Sess. 123-24 (1995) (emphasis added).

put up a DBS receiver or, alternatively, if consumers are forced to run a gauntlet of prior approvals from localities or homeowner associations before installing a DBS receiver, then they are far less likely to choose the DBS alternative to wired media for delivery of multichannel video programming. Congress appreciated fully the magnitude of the disincentive to purchase DBS service posed by such restrictions, weighed it against any conceivable public policy good that could be served by state or local governmental or private restrictions on DBS receivers, which are all less than one meter in size, and reached the conclusion that complete preemption was warranted. Congress gave the Commission a "straight jacket" mandate to implement that conclusion. It left no room to develop regulatory alternatives to preemption.

The Commission has wisely and appropriately proposed a per se preemption for private restrictions on DBS antennas. Philips and Thomson urge expeditious adoption of the proposed rule.

III. Section 207 of the Telecommunications Act of 1996 Likewise Requires the Commission to Adopt a Per Se Preemption of State and Local Regulation of DBS Antennas.

Philips and Thomson strongly disagree with the Commission's tentative conclusion that the complicated rebuttable presumption rule it adopted is a "reasonable way" to implement Congress' intent with regard to state and local regulation of DBS antennas.[4/] An analysis of the plain meaning of the language of the section compels rejection of such a conclusion. Section 207 does not provide the Commission with the discretion to issue a

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4/ See Further Notice at ¶ 59.

rule with anything less than a per se preemption with regard to DBS antennas.

Section 207 of the Telecommunications Act directs the Commission, within 180 days after the date of enactment, to "promulgate regulations to **prohibit** restrictions that **impair** a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."[5/] The provision is unequivocal in directing the Commission to issue rules preempting in their entirety State and local zoning regulations on DBS antennas. Section 207 requires the Commission to **"prohibit"** restrictions. The section does not provide that the Commission can permit restrictions in some instances and ban restrictions in other cases based on aesthetic, health or safety reasons. That is because Congress determined that there is no reasonable State or local governmental regulation of small, unobtrusive 18-inch DBS antennas.[6/] Section 207 does not permit the Commission to substitute its judgment for Congress' own with regard to DBS antennas.

Furthermore, Congress' use of the word **"impair"** in this section is deliberate. Congress determined that any kind of

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5/ Pub. L. No. 104-104, 104th Cong., 1st Sess. § 207, 110 Stat. 56, 114 (1996) (emphasis added).

6/ By contrast, the House Report notes that the section is not intended to affect State and local restrictions on much larger, C-Band satellite dishes. H.R. Rep. No. 204, 104th Cong., 1st Sess. 124 (1995).

restriction, whether by State and local governments or private land use, that placed even the slightest burden on a consumer's ability to erect and use a DBS antenna to receive video programming was simply unacceptable and should be preempted by the Commission's rules.

Moreover the House report language quoted above makes it clear that Congress contemplated a per se preemption of State and local governmental regulations as well as private land use restrictions and intended that these legal impediments be rendered equally unenforceable. To be faithful to the statute and the legislative history the Commission must conform the rule regarding governmental regulation of DBS antennas to the proposed per se preemption for private land use restrictions.

Section 207 and the House report language make no distinction between the treatment of governmental and private restrictions on DBS antennas. Congress perceived governmental and private restrictions on DBS antennas to represent, for all practical purposes, the same threat to consumer availability of DBS service. Thus, the language of Section 207 is broadly crafted to encompass all restrictions on DBS antennas without any specific reference to categories such as governmental or private land use restrictions. The legislative history provides a list of possible restrictions,[7/] including both governmental restrictions (i.e., zoning laws) and private land use restrictions (i.e., homeowners association rules). Neither the

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7/ See H.R. Rep. No. 204, 104th Cong., 1st Sess. 123-24 (1996).

statute nor the accompanying committee report provides any indication that Congress intended the Commission to treat governmental restrictions on DBS antennas any differently than private land use restrictions. The Commission has correctly proposed a per se preemption for the latter, following the clear mandate of Congress. It should adopt that rule swiftly and craft an identical rule for governmental restrictions.

IV. Section 303 of the Communications Act of 1934 Requires the Commission to Exercise Exclusive Jurisdiction over the Regulation of DBS Services.

In Paragraph 59 of the Further Notice, the Commission argues that the language of Section 207 permits the Commission to show deference to local concerns in promulgating the rules to implement this section. To support this argument, the Commission relies upon the reference in Section 207 to Section 303 of the 1934 Communications Act.[8/] The Commission suggests that this reference should be read as an invocation of the Commission's "normal rulemaking authority," and thus, should permit the Commission to take into account local concerns in these rules.[9/]

This interpretation is erroneous. It completely overlooks the obvious reason for the reference to Section 303 of the 1934 Communications Act in Section 207 of the Telecommunications Act. Section 207 appears on the very same page of text in the

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8/ 47 U.S.C. § 303. Section 207 provides in pertinent part that "the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate" the regulations to implement this section. 1196 Act § 207, 110 Stat. at 114.

9/ See Further Notice at ¶ 59.

Telecommunications Act as Section 205.[10/] In Section 205, Congress amends Section 303 of the 1934 Communications Act to vest the Commission with "exclusive jurisdiction to regulate the provisions of direct-to-home satellite services."[11/] Thus, the reference to Section 303 of the 1934 Act in Section 207 of the Telecommunications Act, in fact, invokes the Commission's exclusive jurisdiction to regulate the provision of DBS satellite services, not the Commission's general rulemaking authority.

Moreover, the Commission's deference to State and local government concerns runs completely counter to the public policy goal of Section 205. The legislative history of this section provides that "federal jurisdiction over DBS service will ensure that there is a unified, national system of rules reflecting the national, interstate nature of DBS service."[12/] The complicated, new rebuttable presumption rule that the Commission has adopted will not provide the kind of national uniformity that Congress clearly intended. Instead, the new rule creates the potential for a multiplicity of differing local regulations of DBS antennas, inviting costly and time-consuming litigation, and

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10/ See 110 Stat. 114.

11/ 1996 Act § 205, 110 Stat. at 114 (emphasis added). DTH services are defined as "the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving equipment, except at the subscriber's premises or in the uplink process to the satellite." Id. Clearly, DBS services are encompassed within the definition of DTH services.

12/ H.R. Rep. No. 204, 104th Cong., 1st Sess. 123 (1996) (emphasis added).

creating lingering uncertainty in the minds of consumers about whether local regulation remains a valid bar to the installation of a DBS antenna to receive video programming.

Thus, the reference to Section 303 of the 1934 Communications Act in Section 207 does not support the Commission's reasoning. On the contrary, it highlights the Commission's flawed logic in deferring to local concerns with regard to DBS antennas in this rulemaking. Congress' grant of exclusive jurisdiction to the Commission to regulate DBS service in Section 205 provides no room for the Commission to craft rules that defer to local government regulation.[13/]

Conclusion

Section 207 of the Telecommunications Act directs the Commission to preempt State and local regulatory barriers and private land use restrictions that prohibit consumers from being able to erect and use antennas to receive DBS services, local broadcast stations and MMDS services. The Commission should

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13/ Where Congress intended the Commission to defer to State and local governments it clearly indicated its intention within the statutory language of the Telecommunications Act. See e.g., 1996 Act § 101, 110 Stat. at 63 (preservation of State access regulations for interconnection); 1996 Act § 101, 110 Stat. at 66-70 (actions by State commissions to approve interconnection agreements); 1996 Act § 101, 110 Stat. at 73 (State authority regarding universal service); 1996 Act § 101, 110 Stat. at 79 (preservation of existing State regulations); 1996 Act § 103, 110 Stat. at 81 (State consent for sale of existing rate-based facilities for public utility holding companies); 1996 Act § 103, 110 Stat. at 84 (preservation of State rate-making authority); 1996 Act § 151, 110 Stat. at 89 (consultation with State commission's regarding Bell company compliance with the checklist); 1996 Act § 704, 110 Stat. at 151 (PCS facilities siting).

carry out this Congressional directive now by amending its rules to provide for a strong and unequivocal per se preemption of State and local regulation and private land use restrictions for DBS antennas in this proceeding.

Respectfully submitted,

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